Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities	)	GN Docket No. 00-185
	)	
Internet Over Cable Declaratory Ruling	)	
	)	
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities	)	CS Docket No. 02-52

COMMENTS OF SBC COMMUNICATIONS INC.

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SBC Communications Inc. (SBC) hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking in this proceeding.[1] SBC supports giving cable operators flexibility to design their broadband Internet access services and enter into market-based commercial arrangements with information services providers (ISPs), but *only* as part of a comprehensive broadband regulatory framework that applies to all competing broadband providers. The Commission cannot leave cable broadband Internet access services — the unquestioned leader in the market — free of all regulation unless it makes a similar determination for functionally equivalent wireline broadband Internet access services. As a matter of law and policy, the Commission must apply the same regulations and policies to competing cable and wireline broadband Internet access services.

[1] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 and CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Broadband Declaratory Ruling* or *Cable Broadband NPRM*).

Accordingly, the Commission should take coordinated action in all of its pending broadband-related proceedings — the *Cable Broadband NPRM*, the *Wireline Broadband NPRM*,[2] the *ILEC Broadband Non-Dominance NPRM*[3] and the *Triennial Review* proceeding[4] — to establish a "minimal regulatory environment" for all broadband Internet access services, regardless of technology or the historical classification of the service provider. Consistent with the statutory mandate of section 706 and the Commission's conclusions in the *Cable Broadband Declaratory Ruling*, cable operators and wireline companies should both have the flexibility to determine how retail broadband Internet access services are designed and offered, and how access arrangements with ISPs are structured. If the Commission believes that some type of regulation of broadband Internet access services is warranted, then it should establish a uniform national regulatory framework under Title I that applies to all competing broadband services.

I. Introduction and Summary

The Commission cannot determine the appropriate regulatory framework for cable broadband Internet access services in a vacuum. There is no distinct market for cable modem service, any more than there is a distinct market for DSL service. As the Commission has already concluded, cable modem and DSL are merely competing technologies for providing high-speed access to the Internet.[5] The issue in this proceeding — as well as the related

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[2] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, CC Docket Nos. 02-33, 95-20 and 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) (*Wireline Broadband NPRM*).

[3] *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001).

[4] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, CC Docket Nos. 01-339, 96-98 and 98-147, Notice of Proposed Rulemaking, 16 FCC Rcd 22781 (2001).

[5] *Cable Broadband Declaratory Ruling* ¶ 9.

proceedings to consider the regulatory treatment of wireline broadband Internet access services — is how the Commission should regulate *all* competing broadband services, regardless of technology platform or the historical classification of the service provider.

The Commission has already made fundamental determinations about the nascent and highly competitive nature of the broadband market that should guide its regulation of broadband Internet access services. As the Commission observed in the *Wireline Broadband NPRM*, "the one-wire world for customer access appears to no longer be the norm in broadband services markets as the result of the development of intermodal competition among multiple platforms, including DSL, cable modem service, satellite broadband service, and terrestrial and mobile wireless services."[6] The Commission also has recognized that cable broadband Internet access is by far the "most widely subscribed to technology," with approximately 68 percent of the residential market subscribing to cable modem service.[7] These findings were recently cited by the D.C. Circuit, which noted that "[t]he Commission's own findings . . . repeatedly confirm both the robust competition, and the dominance of cable, in the broadband market."[8]

Not only is cable modem service the market leader, but cable operators also enjoy a number of other significant advantages in the market. Cable modem is cheaper to deploy than DSL service, especially when wireline companies must deploy costly solutions to extend the reach of DSL beyond its traditional distance limitations. Given these advantages, it should not be surprising that cable modem service has been deployed at a faster rate than DSL service and is

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[6] *Wireline Broadband NPRM* ¶ 5.

[7] *Cable Broadband Declaratory Ruling* ¶ 9.

[8] *USTA v. FCC*, slip op. at 22, Nos. 01-1012 *et al.* (D.C. Cir. May 24, 2002).

now available to more than 90 percent of homes passed by cable.[9] Further, once a cable operator has upgraded its network for cable modem service, it has the advantage of being able to provide customers with the "three-trick pony" of voice, video and high-speed data.[10] DSL service, on the other hand, is merely a transition technology that cannot effectively compete with the valuable package of services offered by cable. In order to match the capabilities of cable networks, wireline companies will have to spend billions of dollars deploying fiber-to-the-home in their networks.

In the current regulatory environment, however, the regulation of competing broadband Internet access services is completely divorced from these market realities and, instead, is based almost entirely on the historical classification of the individual service provider. As a result, cable modem service is effectively deregulated and DSL service is regulated as if it were a dominant carrier service provided in a one-wire world with no intermodal competitors. Cable operators derive a significant advantage from disparate regulation, which distorts competition and denies consumers the benefits that flow from a competitive market.

SBC has already detailed the many regulatory advantages enjoyed by cable modem service in the Commission's other broadband-related proceedings. Briefly, wireline companies — particularly ILECs — are restricted in the design and packaging of their broadband Internet access services. Under the *Computer Inquiry* rules, the transmission component of their broadband services must be peeled off and offered as a common carrier telecommunications service that is price regulated and subject to a tariffing requirement, as well as strict accounting and cost allocation rules. As a result, wireline companies are significantly constrained in their

[9] *See* http://www.ncta.com/industry_overview/indStat.cfm?indOverviewID=2.

[10] Investors Business Daily, May 16, 2002 (quoting James Robbins, CEO, Cox).

ability to design and package retail broadband Internet access services in the most cost-effective and customer-friendly manner. In addition, wireline companies lack the flexibility to negotiate market-based commercial arrangements with ISPs, which deprives them of the opportunity to provide new and innovative services to consumers.

In stark contrast, cable operators are not subject to any federal or state regulation of their broadband Internet access services. They have total flexibility to design and package their retail services in the manner that is most desirable to consumers. The prices for their services are not regulated, and they are not subject to any regulatory cost accounting or cost allocation rules, even though their network is used for both cable television service and broadband service. As a result, cable operators are free to cross-subsidize their services by lowering the price of cable modem service and increasing the price of cable television service. Cable operators also are free to determine whether and how to structure their business relationships with ISPs. The bottom line is that a large cable company, such as Comcast/AT&T, AOL Time Warner or Cox is totally unconstrained by regulation on an enterprise level with respect to its broadband investment, network design and use, and the design, packaging, and pricing of broadband service offerings.

It is long past time for the Commission to eliminate these regulatory disparities. As discussed below, the Commission is legally obligated to regulate functionally equivalent broadband Internet access services in a consistent manner. Moreover, asymmetric regulation of cable and wireline services that are competing head to head in the broadband market is extremely harmful to competition. There is a real danger that existing regulatory disparities are so significant as to render wireline broadband Internet access services for the mass market — and particularly ILEC broadband services — uneconomic compared to cable modem service. The Commission must act promptly to implement a consistent regulatory framework for all competing broadband Internet access services that will ensure the future competitiveness of the broadband market.

In Section II below, SBC addresses the relationship between this proceeding and the Commission's pending wireline broadband proceedings. SBC explains that, as a legal and policy matter, the Commission must apply consistent regulations and policies to all broadband services. The Commission also must take immediate action to eliminate the disparity in the assessment of universal service contributions on wireline broadband services compared to cable modem services, and to address the regulatory status of other cable-provided services. In Section III, SBC demonstrates that the Commission should establish a minimal regulatory framework for all broadband Internet access services under Title I of the Act. The Commission should rely on market forces, not regulation, to determine how retail broadband Internet access services are designed and offered, and how access arrangements with ISPs are structured. If the Commission believes that some type of regulation of broadband Internet access services is warranted, then it should establish a uniform national regulatory framework under Title I that applies to all competing broadband services.

II. The Commission Must Apply Consistent Regulations and Policies to All Competing Broadband Internet Access Services

The Commission cannot disassociate this proceeding from the wireline broadband proceedings that have been separately initiated. Cable modem service and DSL service both are part of a discrete product market for broadband Internet access services. The Commission must cease regulating competing broadband Internet access services in a piecemeal fashion based on the historical classification of the service provider. As discussed below, continuing to apply an asymmetric ISP access requirement to functionally equivalent cable and wireline broadband Internet access services would be plainly unlawful and harmful as a policy matter. The

Commission's actions in this proceeding and the other pending broadband-related proceedings must result in consistent regulations and policies that apply equally to cable and wireline broadband Internet access services.

As the Commission has recognized, its goal in this proceeding should be to develop a regulatory approach that is consistent across all competing broadband Internet access services.[11] The Commission also has correctly concluded that this proceeding is the "functional equivalent" of the *Wireline Broadband* proceeding.[12] Therefore, the key legal and policy determinations that the Commission has already made in the *Cable Broadband Declaratory Ruling* will have a significant impact on the development of the regulatory framework for both cable and wireline broadband Internet access services.

The Commission has already removed significant regulatory restraints from cable modem services — the indisputable leader in the broadband Internet access market — in the *Cable Broadband Declaratory Ruling*. The Commission held that:

- Cable modem service is an information service that "is not itself and does not include an offering of telecommunications service to subscribers."[13] This statutory classification was based on the nature of the functions offered to subscribers, regardless of whether a subscriber uses all of the functions provided as part of the service.[14]

- Cable operators should have the flexibility to design their retail services and to package functions as part of a single integrated broadband Internet access service offering.[15]

[11] *Cable Broadband Declaratory Ruling* ¶ 6.

[12] *Wireline Broadband NPRM* ¶ 9.

[13] *Cable Broadband Declaratory Ruling* ¶ 39.

[14] *Id.* ¶ 38.

[15] *Id.* ¶¶ 38-39.

- The public interest does not require that cable operators provide ISPs with stand-alone telecommunications on a common carrier basis. The Commission waived the *Computer Inquiry* service unbundling rules in their entirety as to cable broadband Internet access services so that cable operators are not required to "extract" a telecommunications service from their integrated service offerings.[16]

- To the extent a cable operator provides a stand-alone telecommunications to an ISP, such an offering would be a private carrier service and not a common carrier service.[17]

As a result of the Commission's ruling, cable operators are free to design and offer integrated broadband Internet access services and to structure their relationships with ISPs in whatever manner they determine will best meet market demands.

The Commission's decision in the *Cable Broadband Declaratory Ruling* to not apply the *Computer Inquiry* service unbundling requirements to cable modem service is currently in effect and is not subject to comment in the *Cable Broadband NPRM*. It necessarily follows that any ISP access requirements adopted in this proceeding will be different in kind from the "radical surgery" that continues to be required for wireline broadband Internet access services. This is because cable operators have no obligation to structure their relationship with ISPs such that it involves the provision of stand-alone telecommunications that would potentially be subject to Title II regulation. The issue raised in the *Cable Broadband NPRM* is whether the Commission should adopt some *new* type of ISP access requirement for cable broadband Internet access services or whether it should continue to allow the market for such services to develop free of government regulation. Regardless of how the Commission resolves this issue, the same regulations and policy determinations must apply to wireline broadband Internet access services.

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[16] *Id.* ¶ 43.

[17] *Id.* ¶ 54. The *Cable Broadband Declaratory Ruling* focuses on Internet access providers specifically, *id.* ¶ 11 n.43, but the Commission's holdings appear to apply equally to *any* provider of content or an information service functionality that satisfies the definition of an ISP.

A. Consistent Regulation of Cable and Broadband Internet Access Services is Essential as a Matter of Law and Policy

In the *Cable Broadband NPRM*, the Commission asks about the relationship of this proceeding and the *Wireline Broadband* proceeding.[18] The answer to that question is a foregone conclusion given the Commission's own findings regarding competition in the broadband market and the functional equivalence of cable modem services and DSL services.[19] Establishment of a consistent regulatory framework for cable and wireline broadband Internet access services is not just a matter of "desirability" — it is *essential* as a matter of law and policy.

The Commission itself has properly recognized that it must adopt a "functional approach" to broadband regulation that focuses on the "nature of the service provided to consumers," not the technology used, and must strive to "develop an analytical framework that is consistent, to the extent possible, across multiple platforms."[20] As Chairman Powell has long emphasized, the Commission must move to "some degree of *less* regulation" in the broadband market that would be "*not so technology centric*."[21] "We need these things harmonized," he said.[22] "Otherwise, we're penalizing a competitive technology simply because of its legacy."[23]

Indeed, the Commission is legally obligated to apply consistent regulations and policies to competing cable and wireline broadband Internet access services. In its recent decision

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[18] *Id.* ¶ 78.

[19] *Id.* ¶ 9.

[20] *Wireline Broadband NPRM* ¶¶ 6-7.

[21] *Cable Bureau Suggests Regulatory Forbearance for New Services*, Communications Daily, Feb. 23, 2001, at 2 (emphasis added).

[22] *Id.* (emphasis added).

[23] *Id.*

reversing the Commission for failing to take account of the broadband market as a whole, the D.C. Circuit noted that "[t]he Commission's own findings . . . repeatedly confirm both the robust competition, and the dominance of cable, in the broadband market."[24] The D.C. Circuit's decision leaves no doubt that the Commission commits reversible error if it limits its analysis to a particular category of broadband Internet access service provider. As the court explained, such a cramped inquiry demonstrates a "naked disregard for the competitive context."[25] Accordingly, the D.C. Circuit's decision leaves the Commission with no lawful choice other than to regulate competing cable and wireline providers of broadband Internet access services in a consistent manner.

The D.C. Circuit's decision is consistent with established precedent that the Commission has a duty to apply a functional approach that treats like services alike, and not to make distinctions based on the identity of the provider or the technology used. For example, when the Commission sought to regulate dark fiber provision on a common carrier basis, not because of the characteristics of the service offering, but simply because of the identity of the provider, the D.C. Circuit overturned its decision. As the Court explained, "[w]hether any entity in a given case is to be considered a common carrier" turns not on its historical status, but rather "on the particular practice under surveillance."[26] Similarly, after the Commission refused to place Nextel's "private" wireless service on the same regulatory footing as functionally equivalent "public" service, Congress enacted legislation to "achieve regulatory parity among services that are substantially similar," and to ensure that "equivalent mobile services are regulated in the

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[24] *USTA v. FCC*, slip op. at 22.

[25] *Id.* at 24.

[26] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

same manner."[27] And when the Commission still refused to regulate PCS in the same manner as cellular service, the Sixth Circuit overruled it.[28]

The Commission also has an affirmative statutory obligation to adopt a functional broadband approach that treats like services alike. In section 706 of the 1996 Act, Congress charged the Commission and the states with responsibility for "encourag[ing]" the deployment of "advanced telecommunications capability" by utilizing regulatory forbearance and other methods that "remove barriers to infrastructure investment."[29] The Commission's statutory obligation is to promote the deployment broadband services generally, not to favor any particular technology used to deliver that capability. Congress expressly defined the term "advanced telecommunications capability" to include "high-speed, broadband telecommunications capability" "*without regard to any transmission media or technology.*" Thus, the Commission has an express congressional directive to establish a consistent regulatory framework for all broadband services.

In the *Cable Broadband Declaratory Ruling*, the Commission concluded that its statutory classification of cable modem service was not affected by section 706.[30] The Commission reached this conclusion because the effect its decision was to leave cable modem service free of any regulatory requirements. In other words, the only reason that the statutory mandate of section 706 was not a consideration was because the Commission decided not to regulate cable modem service. The Commission clearly stated that section 706 *will* be a consideration in the

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27 H.R. Rep. No. 103-111, at 259-60 (1993) (discussing Pub. L. No. 103-66, tit. VI, § 6001(a), 107 Stat. 312 (1993)).

28 *See Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995).

29 47 U.S.C. §157 note (emphasis added).

30 *Cable Broadband Declaratory Ruling* ¶ 70.

Cable Broadband NPRM, where the Commission is seeking comment on what regulatory framework will promote the deployment of cable modem service, "as well as other forms of advanced telecommunications capability," to all Americans.[31]

As the Commission implicitly recognized in the *Cable Broadband Declaratory NPRM*, the statutory mandate of section 706 must be a consideration whether the Commission is considering retaining regulations or implementing new regulations that may act as barriers to broadband deployment. It would be utterly inconsistent with section 706 for the Commission to retain regulatory requirements for wireline broadband Internet access services that the Commission has already determined should not be applied to cable modem broadband Internet access service because they would be too burdensome.

Likewise, the Commission must conduct a comparable section 706 cost/benefit analysis for cable and wireline broadband Internet access services as it determines the regulatory framework that should apply to such services. In the *Cable Broadband Declaratory Ruling*, the Commission noted that Internet connectivity in a multiple ISP environment may require the development of certain additional facilities and systems, depending on the chosen technical solution, and necessitate operational and customer service functions that require the development of operational support systems in order to properly provision, bill, and manage subscriber accounts.[32] The Commission also noted the potential cost of regulation, including opportunities for regulatory arbitrage, the imposition of long-term costs on the market, and the potential negative impact on the discovery of network designs, content, applications, and new business

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[31] *Id.*

[32] *Id.* ¶ 19.

models.[33] As SBC demonstrates below, the costs and network management issues created by multiple ISP access are the same for cable and wireline broadband Internet access services. If the Commission determines that a multiple ISP access requirement for cable modem service would be inconsistent with section 706 because it would be too burdensome, then the Commission cannot impose such a requirement on wireline broadband Internet access services for the same reason.

The Commission also must conduct a comparable analysis of other statutory and constitutional requirements as it determines the appropriate regulatory framework for cable and wireline broadband Internet access services. In the *Cable Broadband Declaratory Ruling*, the Commission was guided by section 706 and section 230(b)(2), which mandates the preservation of the "vibrant and competitive free market that presently exists for the Internet and other interactive computer services unfettered by Federal or State regulation."[34] These same statutory provisions must guide the Commission's decisions with respect to all broadband Internet access services. In addition, the *Cable Broadband NPRM* asks about the First Amendment, Fifth Amendment or any constitutional concerns related to the imposition of an ISP access requirement on cable broadband Internet access services.[35] Once again, the same constitutional concerns that the Commission has about regulating cable broadband Internet access services must apply equally to wireline broadband Internet access services.

A regulatory environment that continues to give preferential treatment to cable broadband Internet access services would be particularly unreasonable in light of cable's dominant position

[33] *Id.* ¶ 90.

[34] *Id.* ¶ 4.

[35] *Id.* ¶¶ 80-82.

in the broadband market. At the most basic level, a fundamental prerequisite for a consistent national broadband policy grounded in minimal regulation is that secondary market participants must enjoy the same freedoms as the market leader. It makes no economic sense to saddle secondary market participants with regulatory burdens that limit their network and service design decisions and require them to share their investments and innovations with their competitors, while the market leader remains unconstrained. Such a policy hampers the ability of upstarts to gain ground on the market leader, and it chills their incentives to invest in new technologies, including the packet technology that is fueling broadband. The only way for the Commission to ensure that the broadband market remains competitive is to apply consistent regulations and policies to cable and wireline broadband Internet access services.

Moreover, imposing burdensome regulation on the secondary participants in the market while leaving the market leaders unregulated is ineffective as a practical matter. An asymmetric ISP access requirement that applies only to wireline companies does not ensure meaningful access for ISPs. Because less than one-third of all broadband Internet access services are provided over wireline facilities, a requirement that wireline companies — but not cable operators — offer ISPs access to such services serves little purpose. Likewise, if the Commission believes that market-based solutions involving "negotiations and commercial decisions" are sufficient to ensure consumers a choice of ISPs for the market-leading broadband technology,[36] *a fortiori* the market provides consumers with sufficient protection for secondary technologies, which plainly have less ability to limit consumer choice or otherwise to act anti-competitively.

[36] *Id.* ¶ 30.

B. There Is No Legitimate Justification for Maintaining an Asymmetric ISP Access Requirement

An unfortunate consequence of the Commission's decision to initiate separate "functionally equivalent" proceedings to consider the appropriate regulatory framework for cable and wireline broadband Internet access services is that it increases the risk of piecemeal decisionmaking on the Commission's part that will not harmonize the regulatory framework for competing broadband Internet access services. Some cable operators are attempting to exploit the situation by advocating the schizophrenic position that regulation is wholly unnecessary for cable broadband Internet services, but absolutely essential for competing wireline broadband Internet access services. The arguments for maintaining a disparate regulatory regime are wholly lacking in credibility and do not provide a legitimate justification for an asymmetric ISP access requirement.

First, there is no technical basis for distinguishing between cable broadband networks and wireline broadband networks that could justify maintaining an asymmetric ISP access requirement. Cable modem service and DSL service both utilize shared network architectures, the capacity and use of which must be managed across all end users. A similar packet-based network is used to route traffic between the cable headend and each ISP as is used to route traffic between the wireline central office and each ISP. Therefore, the network architectures of cable broadband networks and wireline broadband networks are functionally equivalent for purposes of providing access to multiple ISPs.

Some cable operators have attempted to confuse the issue by arguing that cable operates a "shared" network and wireline companies operate a dedicated copper network. This argument is a red herring. The facilities between the end user and the cable headend or the end user and the wireline central office — whether such facilities are coaxial cable, copper or hybrid copper/fiber

— are irrelevant to the issue of providing multiple ISP access. Regardless of the shared or dedicated nature of the "last mile" facilities, all Internet traffic carried on both cable and wireline broadband networks is carried over a shared packet-based network connecting the cable headed or central office and each ISP. The network management issues associated with accommodating multiple ISP access start at the headend for cable and the central office for wireline companies and extend to the ISP interconnection point. Thus, to the extent cable operators oppose mandatory ISP access requirements on the grounds that the cable network is a "shared" network,[37] that is precisely the issue wireline companies face with respect to providing multiple ISP access to their "shared" broadband network.

There are no technical impediments to requiring cable operators to provide access to some or all ISPs. The cable industry association has admitted that it is "possible to assign each ISP its own channel."[38] Moreover, as the Commission noted in the *Cable Broadband Declaratory Ruling*, cable operators such as AOL Time Warner are already providing access to multiple ISPs in a number of markets, which precludes any technical infeasibility arguments.[39] Nor do cable broadband networks have any inherent technical limitations that make it more difficult to provide access to some or all ISPs than wireline broadband networks.

There will always be scalability issues that must be addressed as additional customers are added to shared cable and wireline broadband networks, but that is a function of customer growth as much as ISP access. A broadband Internet access provider must manage scalability

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[37] *See* AT&T Comments, CC Docket No. 02-33 at 68-70; *see also* AT&T Comments at 56, *Inquiry Concerning High-Speed Access to the Internet for Cable and Other Facilities*, GN Docket No. 00-185 (Dec. 1, 2000).

[38] *See* National Cable Television Association Comments, GN Docket No. 00-185 at 72 n.233.

[39] *See Cable Broadband Declaratory Ruling* ¶ 52.

issues whether it does business with a single ISP or 100 ISPs. If the largest providers of broadband Internet access services can successfully manage the scalability issues of their rapid customer expansion, then there is no reason they cannot manage similar issues created by ISP access. Further, any network management and incremental scalability issues that are raised by a requirement to provide access to some or all ISPs are equally applicable with respect to cable and wireline broadband networks and thus do not provide a legitimate basis for maintaining an asymmetric ISP access requirement.

In the *Cable Broadband Declaratory Ruling*, the Commission stated that cable operators could face various technical challenges in providing multiple ISP access, such as bandwidth management, IP address assignment, network security and caching.[40] These challenges are either identical to the challenges faced by wireline companies in providing multiple ISP access or completely irrelevant to the issue of ISP access. It is true that multiple ISP access involves managing bandwidth and IP addresses, but the similar packet technologies used in cable and wireline broadband networks require similar management solutions. Likewise, multiple ISP access does not create any unique network security issues for cable broadband networks — any such issues are precisely the same for wireline broadband networks.

Although there is no technical reason why the cable broadband platform cannot be an "open" one, there are significant costs associated with multiple ISP access that ultimately must be passed on to consumers in the form of higher rates for broadband services. Therefore, the Commission must conduct a comparable cost/benefit analysis for cable and wireline broadband Internet access services as it determines whether to impose a multiple ISP access requirement. If the Commission determines that such a requirement is too burdensome for cable, then it must

[40] *Id.* ¶ 15.

reach the same conclusion for wireline companies. The Commission cannot reasonably expect that there will be robust investment and competition between wireline broadband Internet access services and cable broadband Internet access services if wireline broadband networks are saddled with these additional regulatory costs and cable modem networks are not. The only solution that will produce a broadband market with sustainable facilities-based competition is to establish a consistent regulatory framework for all broadband Internet access services.

Second, it would not make sense for the Commission to justify leaving cable modem service free of any ISP access obligation by forcing wireline companies to serve as the ISP provider of last resort. AT&T and other cable operators have argued repeatedly that "basic economic truths" establish that "[n]egotiated agreements, rather than government mandates, are the most appropriate means for creating and defining access relationships" for ISPs.[41] Yet, in a feat of stunning hypocrisy and opportunism, AT&T is now arguing the precise opposite in the *Wireline Broadband* proceeding. It claims that the *Computer Inquiry* requirements must be retained for wireline companies because ISPs rarely have alternative broadband suppliers.[42] It further claims that providers that have less than half of cable's market-share — and that, unlike cable, have a long history of productive business relationships with independent ISPs — will not offer access unless forced to do so by regulation. AT&T thus asserts that, without mandated access to the facilities of the secondary broadband providers, "few [independent ISPs] could be expected to survive in the long-term."[43] Given AT&T's vociferous advocacy in favor of market freedom for cable operators, its position that wireline companies must be regulated because cable

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41 AT&T Comments, GN Docket No. 00-185 at 80.

42 AT&T Comments, CC Docket No. 02-33 at 3.

43 *Id.*

operators are not regulated cannot be taken seriously. If anything, its arguments lend support to those seeking a multiple ISP access requirement for cable operators.

As discussed further below, SBC believes that market forces, not government regulation, should govern the relationship between broadband Internet access providers and ISPs. However, even if the Commission were to determine that regulation is required to ensure ISP access to broadband Internet access services, that would not justify the status quo. It would be the height of arbitrary regulation to justify continued regulation of wireline broadband Internet access services on the basis that deregulated cable operators are not providing access to ISPs. Not only would such a regulatory regime be ineffective — because it would mandate access to only a third of the market and leave the dominant providers unregulated — but it would *deter* cable providers from providing access to ISPs. Cable operators would have every incentive to ensure that wireline companies remain the only available alternative to ISPs so that regulation of wireline broadband Internet access services would continue. That would effectively leave wireline companies subject to the whims of cable providers.

Third, the historical classification of cable operators and wireline companies should not have any bearing on regulation of their competing broadband Internet access services. In the *Cable Broadband Declaratory Ruling*, the Commission determined that cable modem service is not a cable television service that is subject to Title VI. It also concluded that cable modem service is not subject to the local franchise fees that apply to cable television service. As a result, the Commission's regulation of cable modem service will not be driven by the historical statutory classification of cable operators, but rather by the Commission's policy determinations regarding the regulatory framework that is appropriate for a nascent service in a vibrantly competitive market.

The Commission must regulate DSL service the same way. In the *Wireline Broadband* proceeding, commenters representing cable interests make the circular argument that the Commission must regulate DSL service as a telecommunications service because wireline companies are required to offer the telecommunications component of broadband Internet access service as a stand-alone telecommunications service under the *Computer Inquiry* rules. As the Commission repeatedly acknowledged in both the *Cable Broadband Declaratory Ruling* and the *Wireline Broadband NPRM*, the *Computer Inquiry*'s service unbundling obligations are based on legal and factual premises that do not apply to broadband Internet access services.[44] Unlike the circuit-switched wireline network of twenty years ago, the wireline broadband networks of today operate in a world in which convergence has led to significant competition over multiple technology platforms. The presence of bottleneck facilities that provided the underlying basis for *Computer Inquiry* regulation simply does not exist in the market for broadband Internet access. Indeed, as noted above, wireline companies are *secondary* players in the broadband Internet access market, and they lag far behind the market-leading cable operators.

Therefore, having already determined that the *Computer Inquiry* service unbundling rules should be waived in their entirety as to cable broadband Internet access services — in order to avoid the "radical surgery" that would be required for cable operators to "extract" a telecommunications service from their integrated information service — the Commission cannot impose such rules on wireline broadband Internet access services.[45] Section 706 requires that the Commission eliminate regulation of wireline broadband Internet access services that the

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[44] *Wireline Broadband NPRM* ¶ 36 (emphasis added).

[45] *Cable Broadband Declaratory Ruling* ¶ 43.

Commission has already concluded would be too burdensome for cable broadband Internet access services.

C. Universal Service

The Commission must take immediate action to eliminate the disparity in the assessment of universal service contributions on wireline broadband services, which increases the cost of wireline broadband Internet access services by 7 percent compared to cable modem and other competing broadband Internet access services. As a result of this disparity, wireline broadband Internet access service providers are put in an impossible position. Either they must absorb the additional 7 percent cost in order to remain competitive with cable modem service or pass the additional cost through to consumers and risk not being price competitive with cable modem service. It is an indefensible for the Commission to permit a public policy program to create this type of competition distortion in the robustly competitive broadband market.

Currently, all wireline companies (including ILECs, CLECs and IXCs) are required to contribute to universal service based on the telecommunications component of their broadband Internet access services.[46] This assessment is passed through to the ISP, which must absorb the cost of the contributions or pass the cost through to its retail customers. In contrast, an ISP that self-provisions the telecommunications component of broadband Internet access service — such as a cable operator that offers an integrated service offering — is not required to contribute to universal service, either directly or indirectly.[47] As a result, cable modem services enjoy an artificial 7 percent or more cost advantage in the broadband market compared to competing DSL

[46] *Wireline Broadband NPRM* ¶¶ 72-73 .

[47] *Id.* ¶ 74.

services due to the disparate impact of this important public policy program. Such a result distorts competition and heightens the advantages already enjoyed by the market leaders.

The Commission is considering whether to assess universal service contributions on all broadband providers in the *Wireline Broadband* proceeding, and it is considering significant reforms to the contribution and recovery process in a separate universal service proceeding. However, it could be months before these proceedings are resolved. Rather than continuing to bestow an artificial regulatory advantage on cable operators during the interim period, the Commission should take immediate action to rationalize the obligation as between cable modem service and DSL service. The Commission should either exercise its discretion under section 254(d) and assess universal service contributions on both services or it should not assess universal service contributions on either service.

The Commission need not decide the broader universal service issues raised in the *Wireline Broadband* proceeding in order to provide this interim relief. Whether the Commission decides to include all broadband services in the contribution base (as SBC advocates) or to exclude such services from the contribution base, there can be no question that functionally equivalent cable modem and DSL services ultimately must be afforded consistent treatment. Therefore, the Commission can and should establish an interim requirement for both cable modem service and DSL service without prejudging the permanent treatment of broadband services for universal service purposes.

D. Regulation of Other Cable-Provided Services

The *Cable Broadband Declaratory Ruling* focuses exclusively on broadband Internet access services and does not address other telecommunications services or broadband information services offered by cable operators. Yet the Commission expressly acknowledged the fact that cable operators are providing these other types of broadband services, such as Virtual Private Network services, to business customers.[48] The Commission cannot ignore these other cable-provided services.

If other cable-provided services are to be subject to the same "hands off" regulatory approach as cable broadband Internet access services, then the Commission should make an affirmative decision to that effect. It also should harmonize its regulatory approach with its regulatory approach to functionally equivalent services provided over other platforms. Simply ignoring the issue and leaving cable operators free to define their own regulatory regime would be an abdication of the Commission's responsibilities.

In addressing other cable-provided services, the Commission should recognize that there is no logical basis for distinguishing broadband Internet access services from other broadband information services. For the same reasons that the Commission concluded that Title II regulation, including the *Computer Inquiry* rules, should not apply to cable broadband Internet access services, it should hold that Title II regulation does not apply to any broadband information services, regardless of technology or the historical classification of the service provider. By making plain that all broadband information services will be regulated only under Title I, and not under the *Computer Inquiry* regime, the Commission will remove a significant hindrance to development and deployment of important new broadband technologies and applications. That course of action is particularly crucial in broadband, where technological change is occurring rapidly and certainty as to the treatment of new offerings is necessary for consumers to benefit from these advances.

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[48] *See Cable Broadband Declaratory Ruling* ¶ 31 n.129.

III. The Commission Should Establish a Minimal Regulatory Environment for Broadband Internet Access Services

The Commission should take a "hands-off" regulatory approach to all broadband Internet access services and allow the market to develop free from the distortions of regulation. By regulating broadband Internet access services under Title I instead of Title II, the Commission will give itself the flexibility to allow market forces, not regulation, to shape broadband offerings, while at the same time retaining jurisdiction to intercede at some later point if necessary to protect consumers. This market-based policy will benefit broadband Internet access service providers and ISPs, and ultimately produce new and innovative services for consumers.

The Commission asks about three specific issues in the *Cable Broadband NPRM*: (i) whether to impose any requirements governing multiple ISP access to cable broadband Internet access services; (ii) whether any Title II regulation should apply to the telecommunications component of such services; and (iii) whether to preempt state regulation of cable broadband Internet access services. SBC addresses each of these issues below.

A. ISP Access

The Commission has already gone a long way toward implementing a market-based approach to the issue of ISP access in the broadband market. In the *Cable Broadband Declaratory Ruling*, the Commission left the unquestioned leaders in the broadband mass market — cable operators — free to design their broadband Internet access services and structure their relationships with independent ISPs in whatever manner they determine will best meet market demands. Under the Commission's ruling, cable broadband Internet access is regulated only under Title I and is not subject to the *Computer Inquiry* requirements; thus, cable companies can offer customers a bundled Internet access service without creating a stand-alone telecommunications service offering. Moreover, cable companies and individual ISPs can negotiate the particular access arrangement the private parties jointly determine to be most advantageous.

The Commission's ruling provides the foundation for a market-based ISP access policy that applies to all broadband Internet access services. Although cable operators are unquestionably the market leaders, the market for broadband Internet access is competitive, as the Commission itself has previously concluded.[49] The existence of such competition negates the need for regulation to prevent potential anti-competitive conduct against ISPs. As SBC explained in the *Wireline Broadband* proceeding, SBC currently does business with hundreds of ISPs and it has no desire to discontinue those business relationships. To the contrary, SBC has every incentive to maximize the sale of its broadband services and the use of its network through relationships with unaffiliated information service providers. The absence of regulation will simply allow parties to structure their relationships in ways most responsive to market demand.

ISPs themselves have recognized that the market, and the existence of significant intermodal competition between competing broadband platforms, will permit them access on reasonable terms. Hence, the US Internet Industry Association (USIIA) — an association of nearly 300 diverse Internet providers, including ISPs — entered into a Memorandum of Understanding (MOU) with SBC that urges the Commission to replace regulation with market-based commercial arrangements.[50] And Earthlink's President recently stated that the existence of "competing technologies" would "drive the prices down" for ISP access at the "wholesale

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[49] *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules*, Third Report and Order and Memorandum Opinion and Order, 5 FCC Rcd 11857, 11867, ¶ 23 (2000).

[50] A copy of the MOU, which was jointly filed by SBC and USIIA in the *Wireline Broadband* proceeding, is attached hereto as Attachment 1 for inclusion in the record of this proceeding.

level," resulting in lower consumer prices.[51] Earthlink has also entered into arrangements to provide DSL and satellite-based high-speed Internet access. Of course, to the extent that the Commission adopts new regulations — especially asymmetric ones — this competition between technologies will be reduced, perversely harming the interests of both ISPs and consumers.

As reflected in the MOU, both broadband Internet access service providers and ISPs benefit from the flexibility afforded by market-based commercial agreements. In the absence of restrictive government regulation, cable operators and ISPs have entered into a "wide variety of arrangements" that depart from the traditional *Computer Inquiry* model.[52] These types of arrangements should continue to be permitted, but only if SBC and other wireline companies have the same freedom as cable providers to pursue them. For example, all broadband Internet access service providers should be free to enter into joint provisioning arrangements with independent ISPs to provide broadband Internet access, in much the way some cable providers are now doing.[53] Under this type of arrangement, the broadband provider and the ISP cooperate to provide a retail broadband Internet access service offering.[54] In addition, broadband providers should have the ability to negotiate private carriage arrangements that are tailored to the unique circumstances of particular ISPs. These deals might involve revenue sharing and other mutually beneficial business arrangements. Broadband providers also should have the flexibility to enter into network-to-network interface arrangements with ISPs that are technically more efficient

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[51] *Earthlink Prices May Drop: Technology Rivalries a Factor*, Investor's Business Daily, Apr. 16, 2002, at A-8.

[52] *See Cable Broadband Declaratory Ruling* ¶ 48.

[53] *See id.* ¶ 26.

[54] *See id.* ¶ 52.

than the current arrangements. Many of these arrangements, which are fully consistent with the goals of section 706, are problematic under the rigid structure of the *Computer Inquiry* regime.

Moreover, the Commission must consider the significant costs and network management issues created by any government-mandated multiple ISP access requirement. In the *Cable Broadband Declaratory Ruling*, the Commission noted that Internet connectivity in a multiple ISP environment may require the development of certain additional facilities and systems, depending on the chosen technical solution, and necessitate operational and customer service functions that require the development of operational support systems in order to properly provision, bill, and manage subscriber accounts.[55] The Commission also noted the potential cost of regulation, including opportunities for regulatory arbitrage, the imposition of long-term costs on the market, and the potential negative impact on the discovery of network designs, content, applications, and new business models.[56]

A market-based approach to ISP broadband access will ensure that broadband Internet access service providers are not dissuaded by onerous requirements or regulatory obstacles from investing the billions of dollars necessary for broadband to fulfill its enormous potential. Put differently, the use of Title I is strongly pro-competitive because, as Chairman Powell recently explained, what is needed in the broadband context is "a regulatory environment that provides the incentives necessary to deploy new services on the part of the private sector. The more onerous the regulatory environment, the costs of deployment becomes higher and riskier and more difficult . . . . [W]e are fearful of intervening prematurely in a way that frustrates

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[55] *Id.* ¶ 19.

[56] *Id.* ¶ 90.

experimentation and creativity."[57] At the same time, however, under Title I, the Commission retains jurisdiction to protect the public interest should that become necessary at some later point in broadband's development.[58]

Should the Commission determine that some regulatory requirements are necessary, it should adopt very limited rules under Title I that apply across the board to all broadband providers. An appropriate Title I regime would not only apply to all broadband platforms, it would also be minimally regulatory and tailored to the legitimate regulatory concern of ensuring that consumers have access to a sufficient choice of ISPs. In a competitive market, any Title I requirement to provide multiple ISP access should give broadband Internet access service providers the flexibility to negotiate market-based arrangements with unaffiliated ISPs to provide network access, without dictating the business structure of that arrangement or mandating any particular technical criteria. It should not mandate any particular form of access, and should expressly recognize the ability of providers to structure creative arrangements that allow for differentiation in business relationships based on volume, terms, points of connection, and other established market services.

A key benefit of Title I is that it provides a means of applying consistent regulations and policies across all competing broadband platforms, regardless of technology or the historical classification of the service provider. As previously discussed, it would be wholly inconsistent with market realities and a Title I approach to address the issue of multiple ISP access differently for cable operators than for wireline companies. The results of the Commission's cost/benefit

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[57] Michael K. Powell, Chairman, FCC, Remarks at the ITU Second Global Symposium for Regulators, Geneva, Switzerland (Dec. 4, 2001).

[58] *See Cable Broadband Declaratory Ruling* ¶¶ 75-79.

analysis will be the same for cable and wireline broadband Internet access services. To the extent the Commission determines that some form of multiple ISP access should be mandated under the public interest parameters of Title I, all broadband Internet access service providers must have the same flexibility — from a network, service design and operational perspective — to satisfy its access obligation. In other words, any multiple ISP access requirement must be competitively and technologically neutral in its effect.

B. Common Carrier Regulation

The Commission held in the *Cable Broadband Declaratory Ruling* that no element of cable modem service is subject to common carrier regulation. It confirmed that cable modem service is an information service that does not include the provision of telecommunications service to end users.[59] To the extent cable modem service could be subject to telecommunications service classification in the Ninth Circuit as a result of the court's *AT&T v. City of Portland* decision, the Commission tentatively concluded that it should forbear from all common carrier regulation.[60] In addition, the Commission held that cable operators are not required to enter into access arrangements with ISPs, let alone provide ISPs with stand-alone telecommunications that would potentially be subject to Title II regulation.[61] Even if a cable operator does provide an ISP with stand-alone telecommunications, the Commission held that such an offering is a private carrier service and not a common carrier service.[62]

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[59] *Id.* ¶ 39.

[60] *Id.* ¶ 95.

[61] *Id.* ¶ 43.

[62] *Id.* ¶ 54.

The Commission's policy determinations provide the foundation for the regulatory framework that should apply to all broadband Internet access services. All functionally equivalent broadband Internet access services should be classified as "information services," not as "telecommunications service," under the Communications Act. Moreover, consistent with the Commission's established precedent, the intensely competitive market for broadband Internet access services should remain free of unnecessary regulation. As long ago as *Computer I*, the Commission declined to regulate competitive information services, and instead properly left their development to the existing marketplace.[63] As the Commission concluded in its *Computer II* and *Computer III* proceedings, the decision to leave the computer processing industry free from Title II regulation, and subject only to the free give-and-take of the market place has led to "exponential growth" in the number of participants and products in that market.[64] "[C]ompetition, not regulation, holds the key to stimulating further deployment of advanced telecommunications capability."[65] This reliance on the market to promote innovation and invention is even more important today, when competitors need to make huge investments to

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[63] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities (Computer I),* Final Decision and Order, 28 F.C.C.2d 267 (1971).

[64] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, Final Decision, 77 F.C.C.2d 384, 433 (1980); *see also* J. Oxman, Office of Plans and Policy, FCC, *The FCC and the Unregulation of the Internet* at 6, OPP Working Paper No. 31 (July 1999) ("The FCC has taken numerous steps since the early days of the telecommunications data services industry three decades ago to permit competitive forces, not government regulation, to drive the success of that industry. . . . [T]he success of the Internet today is, in part, a direct result of those policies.").

[65] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans In a Reasonable And Timely Fashion*, Second Report, 15 FCC Rcd 20913, 21004, ¶ 246 (2000); *see also* Memorandum Opinion and Order, *Amendments of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 2 FCC Rcd 3035, 3061, ¶ 181 (1987) (discussing "the benefits attainable through a highly competitive free market in enhanced services").

develop and deploy new technologies. Consumer demand, rather than regulatory fiat, should drive the allocation of investment resources.

To the extent it is possible that *any* broadband Internet access services may be subject to telecommunications service classification in the Ninth Circuit, the Commission should forbear from applying Title II regulation to such services. The test for forbearance is easily satisfied, given the historical lack of any regulation of retail broadband Internet access services and the amount of competition in the broadband market. Moreover, it would not be in the public interest to apply Title II regulation to broadband Internet access services that have developed in the marketplace free from the burdens and competitive distortions of regulation.

The Commission also should not apply Title II regulation to the arrangements between broadband Internet access service providers and ISPs. There are two aspects of the Commission's holding in the *Cable Broadband Declaratory Ruling* that are relevant to this issue. First, cable operators enjoy complete freedom to decide whether to enter into access arrangements with unaffiliated ISPs and how to structure those arrangements. That means a cable operator has *no obligation* to structure its arrangement with an ISP in such a way that it involves the provision of stand-alone telecommunications that would potentially be subject to Title II regulation. In fact, the Commission concluded that existing arrangements between cable operators and ISPs do not appear to involve the provision of stand-alone telecommunications, but rather are structured as jointly provisioned information services.[66]

Second, the Commission held that cable operators can provide ISPs with stand-alone telecommunications on a private carrier basis. This holding is a reasonable extension of the Commission's decision not to apply the *Computer Inquiry* requirements to cable modem service.

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[66] *Cable Broadband Declaratory Ruling* ¶¶ 48-53.

If the Commission were to impose Title II regulation on stand-alone telecommunications that a cable operator provides to an ISP, cable operators could simply exercise their discretion not to enter into arrangements with ISPs. By giving cable operators the flexibility to enter into private carrier arrangements with ISPs, the Commission ensured that cables' arrangements with ISPs will be structured according to the needs of the market.

The Commission's holdings in the *Cable Broadband Declaratory Ruling* implicitly reflect a policy determination that it is not in the public interest to require the indisputable leaders in the broadband Internet access market — cable operators — to provide ISPs with stand-alone telecommunications services on a common carrier basis. The same policy determination should be applied to all broadband Internet access service providers. SBC agrees that it is better to let the market, rather than government regulation, determine the relationships between broadband Internet access service providers and ISPs. In order to ensure that regulatory considerations do not impede or restrict the ability of parties to enter into market-based commercial agreements, the Commission should not impose Title II regulation on any aspect of broadband Internet access services. The ultimate beneficiary of this policy will be consumers, who will have access to new and innovative broadband services. To the extent the Commission believes any regulation of broadband Internet access services is necessary, it should adopt such regulations under Title I, rather than applying Title II regulation.

C. State Preemption

The Commission seeks comment on whether it should interpret its assertion of jurisdiction to preclude state and local authorities from regulating cable modem service.[67] Legally, there can be no question that the Commission has the authority to preempt state

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[67] *Id.* ¶ 98.

regulation of broadband services. As the D.C. Circuit explained in affirming the Commission's *Computer II* decision, "Congress has empowered the Commission to adopt policies to deal with new developments in the communications industry."[68] And that authority includes the ability to preempt state regulation of interstate and jurisdictionally mixed enhanced services,[69] a category into which wireline broadband service clearly falls. As this Commission concluded in its *GTE ADSL Tariff Order*, "when xDSL transmission is used to provide Internet access services, these services are interstate, and thus, subject to Commission jurisdiction."[70]

"The purpose of Congress is the ultimate touchstone" of preemption law,[71] and here Congress's intention is clear. In section 706 of the 1996 Act, Congress directly instructed the Commission to use its regulatory jurisdiction to promote competition and to encourage deployment of broadband facilities.[72] Inconsistent and intrusive state regulation undermines each of these statutory goals. Congress additionally imposed explicit limits on state commission authority with respect to subjects addressed by the Act and the Commission's implementing

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[68] *Computer & Communications Industry Ass'n,* 693 F.2d at 217.

[69] *See People of the State of California v. FCC*, 39 F.3d 919, 931-33 (9th Cir. 1994); *Wireline Broadband NPRM* ¶ 62; *see also Computer & Communications Indus. Ass'n*, 693 F.2d at 206 ("For the federal program of deregulation to work, state regulation of CPE and enhanced services had to be circumscribed.").

[70] *Wireline Broadband NPRM* ¶ 62 (citing Memorandum Opinion and Order, *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTE Transmittal No. 1148*, 13 FCC Rcd 22466 (1998)).

[71] *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) (quoting *Malone v. White Motor Corp*., 435 U.S. 497, 504 (1978)); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-38 (1990).

[72] Congress may choose to "take unto itself all regulatory authority over [the subject area], share the task with the States, or adopt as federal policy the state scheme of regulation. The question in each case is what the purpose of Congress was." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citation omitted).

regulations. Thus, section 261(c) provides that: "Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, *as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part*."[73]

The Commission did not hesitate to use this preemptive authority in its *Computer II* and *Computer III* proceedings, and for good reason. Intrusive and inconsistent regulation by the states threatens "the efficient utilization and full exploitation of the interstate telecommunications network."[74] Regulatory variation creates uncertainty, disruption, and delay, and interferes with the strong federal policy, codified in the 1996 Act, in favor of promoting widespread broadband deployment.[75] In light of the Commission's previous conclusion that broadband services are jurisdictionally interstate, there can be no question as to the scope of the Commission's authority to preempt state regulation that would effectively negate federal policy.[76]

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[73] 47 U.S.C. § 261(c) (emphasis added).

[74] *Computer III*, 104 F.C.C.2d at 1125, ¶ 343.

[75] *Id.*, at 1127-28, ¶ 348 ("In this context, to permit application of inconsistent regulatory requirements to the provision of interstate and intrastate enhanced service offerings would be impracticable and would effectively negate federal policies."); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 2 FCC Rcd 3072, 3102, ¶ 208 (1980) ("Because of the shared interstate and intrastate nature of the ITCs' underlying networks, which support the interstate basic services that may be offered with enhanced services, strong federal policies against imposition of structural separation on ITC provision of enhanced services, and in favor of the imposition of specific nonstructural safeguards, cannot coexist with conflicting state imposed regulatory requirements.").

[76] *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999) ("With regard to the matters addressed by the 1996 Act," Congress "unquestionably" "has taken the regulation of local telecommunications competition away from the States").

Accordingly, the Commission has the power to preempt state regulation of broadband Internet access services and ample reason to exercise that authority. The Commission cannot establish a coherent national framework for regulating broadband if it allows the states to create their own patchwork of countervailing rules. State regulation is wholly incompatible with the goals of encouraging broadband deployment, promoting intermodal competition through policies that are neutral between competing platforms and technologies, establishing a minimal, deregulatory environment that promotes innovation, and developing a consistent broadband policy. In short, state interference in the regulation of broadband is incompatible with each of guiding principles that the Commission articulated in the *Cable Broadband Declaratory Ruling*, as well as in the *Wireline Broadband NPRM*. Moreover, the Commission is the only regulatory body with the requisite jurisdiction to implement a consistent broadband policy across competing platforms. Unless the Commission acts decisively, state regulation threatens to undermine every step the Commission has proposed to take in establishing a national policy for broadband.

IV. Conclusion

SBC supports a minimal regulatory environment for all broadband Internet access services, including cable modem services. The Commission, however, cannot disassociate this proceeding from the pending wireline broadband proceedings. It must be guided by the same principles and statutory considerations, particularly section 706, and perform the same cost/benefit analysis as it determines the appropriate regulatory framework for functionally equivalent cable modem services and DSL services. It also must apply consistent regulations and policies to competing cable modem services and DSL services in order to ensure the future competitiveness of the broadband market. This includes taking immediate action to eliminate the disparity in the assessment of universal service contributions on wireline broadband services compared to cable modem services, and address the regulatory status of other cable-provided services.

The Commission's goal in all of its pending broadband-related proceedings should be to establish a minimal regulatory environment for all broadband Internet access services, regardless of technology or the historical classification of the service provider. In particular, the Commission should hold that: (i) all broadband Internet access service providers have the flexibility to design their retail services and to package functions as part of a single integrated broadband Internet access service offering; (ii) no broadband Internet access service provider is required to perform radical surgery and extract a stand-alone telecommunications service from its integrated service offering; and (iii) all broadband Internet access service providers have the flexibility to enter into private carrier and other market-based commercial agreements with ISPs. If the Commission believes that some type of regulation of broadband Internet access services is warranted, then it should establish a national uniform regulatory framework under Title I that applies to all competing broadband services.

Respectfully Submitted,

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